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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LAWON TELEFARROW WASHINGTON,

Defendant and Appellant.

B236692

(Los Angeles County
Super. Ct. No. BA384972)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Sam Ohta, Judge. Affirmed.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Chung L. Mar and Seth P.
McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Lawon Telefarrow Washington appeals the judgment entered following his conviction by jury of second degree burglary, attempted grand theft and theft (unauthorized possession of the access card account information of another with the intent to use it fraudulently). (Pen. Code, §§ 459, 664/487, subd. (a), 484e, subd. (d)). Washington contends the trial court erroneously admitted evidence of an uncharged prior commercial burglary to show intent to steal in the charged burglary. (See Evid. Code, § 1101, subd. (b).) We find no error in the trial court's ruling and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

1. The current incident at Macy's.

On April 20, 2011, at 5:47 p.m., Sheila Bradley, a salesperson at the Macy's store in Baldwin Hills, assisted Washington and a female companion with the purchase of fragrances on a Macy's charge account. Washington said he had been added to the account earlier that day. He provided identification and entered his Social Security number into a keypad next to the register. Because Washington's name did not match the name on the account, Bradley telephoned the credit department and verified that Washington had been added to the account. .

After Washington completed the purchase, Macy's loss prevention officer Yesenia Villanueva began surveillance of Washington in the store via a closed-circuit television system. Washington and his female companion separated. Washington walked around the store alone but made contact with a second female and a male.

Loss prevention officer Michelle Tejeda telephoned the Macy's account holder, Jose Hernandez, who stated he had not authorized anyone other than himself to use the account and asked Tejeda to call the police.

Washington eventually went to the fragrance department where the male gave Washington some merchandise. The females approached Washington in the shoe department and gave him additional merchandise. Washington purchased the merchandise in the shoe department, again using Hernandez's account. Washington showed his driver's license and entered his Social Security number into a keypad. After Washington was given a receipt, loss prevention officers Villanueva, Tejeda and Eddie Rodriguez asked Washington to accompany them to the office. Washington did not seem

inclined to comply and Rodriguez attempted to handcuff him. At that point, Washington ran towards a store exit and the loss prevention officers had to physically detain him.

Hernandez, the account holder, testified he did not know Washington and had never added Washington to his Macy's account or given him permission to use it. On cross-examination, defense counsel asked if Hernandez had ever had a sexual relationship with Washington and whether he had ever met Washington in North Hollywood. Hernandez responded in the negative to each question.

2. The Costco burglary.

On September 11, 2002, Regina Lucero, a cashier at Costco's Hawthorne location, buzzed Washington and another male into the caged area that enclosed cigarettes. A few minutes later, an alarm associated with an emergency exit near the caged area sounded. Lucero turned and saw Washington and his companion standing at the exit, each with cases of cigarettes on their shoulders. It appeared the two men panicked when the exit door did not immediately open. They dropped the cigarettes and ran toward the front entrance of the store but were detained before they could reach it. As a result of this incident, Washington was convicted of second degree burglary.

3. Argument of the parties.

The prosecutor argued the jury could infer Washington intended to steal when he entered the Macy's store based on his prior burglary conviction. Also, when confronted, Washington did not state he had permission to use the account. Instead he ran, indicating consciousness of guilt.

Defense counsel argued Washington entered the store with the intent to shop. He gave his correct driver's license and Social Security number and, according to Macy's records, Washington was authorized to use the account. In order to place someone on an account, personal information known only to the card holder must be provided. Thus, the jury had to decide whether Hernandez told the truth when he denied he had ever been in a relationship with Washington.

In rebuttal, the prosecutor stressed the absence of any evidence of a relationship between Hernandez and Washington, noting questions are not evidence. The prosecutor asked the jury whether there had been any awkward pauses or flickers of recognition

between Hernandez and Washington when Hernandez was in court testifying. The prosecutor suggested it would have been “pretty bold” for Hernandez to come to court, swear to tell the truth and then frame Washington for burglary if Hernandez, in fact, had given Washington permission to use the account. “I think that’s something that we might be able to pick up on”

CONTENTIONS

Washington contends the trial court erroneously admitted evidence of the Costco burglary and, even if the evidence were admissible, it should have been excluded under Evidence Code section 352.

DISCUSSION

1. Relevant principles.

Evidence Code section 1101, subdivision (a) prohibits the admission of character evidence, including evidence of specific instances of uncharged offenses, to prove the conduct of a person on a particular occasion. Notwithstanding this prohibition, Evidence Code section 1101, subdivision (b) permits a party to introduce evidence of uncharged offenses when relevant to prove some fact in issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or consent.

The admissibility of evidence of uncharged offenses under Evidence Code section 1101, subdivision (b) depends upon the fact sought to be proven and the degree of similarity between the charged and uncharged offenses. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403, superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) “The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent.” (*People v. Ewoldt, supra*, at p. 402.) To be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference the defendant probably harbored the same intent in each instance. (*Id.*; *People v. Lindberg* (2008) 45 Cal.4th 1, 23; *People v. Kelly* (2007) 42 Cal.4th 763, 783.)

When evidence of uncharged crimes is deemed admissible under Evidence Code section 1101, subdivision (b), the trial court also must determine if the evidence should be excluded as unduly prejudicial under Evidence Code section 352.¹ (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123.) Because evidence of uncharged crimes is inherently prejudicial, such evidence must have “ ‘substantial probative value’ “ to be admissible. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404, italics omitted; *People v. Lindberg, supra*, 45 Cal.4th at p. 23; *People v. Kelly, supra*, 42 Cal.4th at p. 783.) *Ewoldt* identified various factors affecting the probative value versus the prejudicial effect of uncharged crimes evidence including the tendency to demonstrate the fact in issue, the independence of the source of the uncharged crime, whether the uncharged crime resulted in conviction, whether the facts of the uncharged crime are more inflammatory than the facts of the charged offense, the remoteness in time to the charged offense, and whether there is other evidence to substantiate the fact in issue. (*People v. Ewoldt, supra*, at pp. 404-406.)

We review rulings under Evidence Code sections 1101, subdivision (b) and 352 for abuse of discretion. (*People v. Foster* (2010) 50 Cal.4th 1301, 1328; *People v. Davis* (2009) 46 Cal.4th 539, 602; *People v. Cole* (2004) 33 Cal.4th 1158, 1195.)

2. Litigation of the issue in the trial court.

Prior to trial, the prosecutor requested permission to introduce evidence of the Costco burglary to show Washington entered Macy’s in the current case with the intent to deprive. After hearing argument, the trial court found the Costco incident sufficiently similar to the charged offense for the purpose of proving intent and further found evidence of the Costco incident would not be unduly prejudicial to Washington.

The trial court noted Washington’s defense was that he had authority to use the credit card. Thus, intent was the pivotal issue in the case. Applying the *Ewoldt* factors, the trial court noted the source of the uncharged act was independent of the charged offense, the two offenses were unrelated and evidence related to one would not confuse

¹ Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury.”

the jury as to other. Also, the uncharged conduct, attempting to steal cigarettes at a Costco, was not inflammatory, the prior conviction was not remote, and evidence of the uncharged offense would not cause undue consumption of time.

The trial court indicated it understood the two incidents were not “mirror images” in that one involved the physical taking of property and the other involved credit card theft. However, there were notable similarities in that both incidents occurred at a large store and in each case Washington had at least one accomplice. The trial court concluded the probative value of the Costco burglary on the issue of intent to steal outweighed the prejudicial effect of the evidence and ruled the evidence admissible.

3. The trial court properly admitted evidence of the Costco burglary to show Washington’s intent in the Macy’s burglary.

By pleading not guilty, Washington placed all elements of the charged offense at issue, including the requisite intent. (*People v. Lindberg, supra*, 45 Cal.4th at p. 23). Thus, the People were required to establish that Anderson entered the Macy’s store “with the intent to commit grand or petit larceny or any felony” (Pen. Code, § 459.) Washington conceded he made purchases on Hernandez’s Macy’s account but claimed he had permission to use the account. Thus, intent was the critical issue in the case. Lacking direct evidence of Washington’s mental state, evidence of the Costco burglary was highly relevant to demonstrate Washington’s intent during the Macy’s incident. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 394, fn. 2 [where the physical act constituting the offense is conceded but the accompanying intent is disputed, evidence of uncharged crimes properly may be offered].)

Here, the Costco incident was sufficiently similar to the Macy’s incident to permit evidence of the former to be admitted to show Washington’s intent during the latter. In both instances Washington entered a store with at least one other person, selected items, attempted to unlawfully leave the store with the merchandise, and ran when problems in the commission of the crime arose.

As the trial court noted, the Costco burglary had substantial probative value in determining Washington’s intent in the Macy’s incident. The probative value of the Costco burglary was heightened by the fact it was proved by evidence independent of the

Macy's burglary. Evidence of the Costco incident was not cumulative as there was little other evidence tending to establish Washington's state of mind at the time of the Macy's incident. Also, evidence of the Costco burglary did not consume an undue amount of time and would not have confused the jury as it was clear the Costco burglary involved a separate incident. Also, the prejudicial impact of the Costco evidence was lessened because the jury was aware Washington was convicted of burglary in that offense. Thus, there was no risk the jury would punish Washington for that offense, rather than consider the evidence solely for the limited purpose for which it was admitted on the current charge. Finally, as noted by the trial court, an attempt to steal cigarettes is not the type of evidence that would inflame a jury.

Washington claims there must be a *distinctive* similarity between the two crimes in order for the uncharged incident to be relevant, citing *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1845. He argues the Costco incident was a "smash and grab" crime whereas the Macy's incident involved unauthorized use of a credit card to purchase merchandise using his own identification and social security number. Although Washington had companions in the store, he alone made purchases.

Washington is wrong on the law. Distinctiveness is not required to prove intent. *Delgado*, cited by Washington, noted some earlier case had held distinctiveness a prerequisite to admission of other crimes to prove facts other than identity. However, *Delgado* also noted *People v. Robbins* (1988) 45 Cal.3d 867, 880, had retreated from that position and held when "evidence of an uncharged offense is introduced to prove intent, the prosecution need not show the same quantum of 'similarity' as when uncharged conduct is used to prove identity. [Citations.]" (*Ibid.*) *Delgado* concluded " 'a *distinctive* similarity between the two crimes is often unnecessary for the other crime to be relevant' " on the issue of intent. (*People v. Delgado, supra*, 10 Cal.App.4th at p. 1845, citing *People v. Nible* (1988) 200 Cal.App.3d 838, 848.) This view subsequently was confirmed by *Ewoldt*.

Washington also claims the two incidents lack any direct relationship between them, citing *People v. Daniels* (1991) 52 Cal.3d 815, 857. In *People v. Daniels*, the defendant was accused of murdering two police officers who had come to take him to

prison for a robbery in which he had been rendered a quadriplegic by other police officers who shot the defendant as he tried to escape. (*Id.* at p. 837.) *Daniels* held the trial court did not abuse its discretion in admitting evidence of the prior robbery because there was “a direct relationship between the police rendering defendant a paraplegic and defendant murdering the officers in retribution.” (*Id.* at p. 857.) Thus, evidence of the defendant’s injury in the robbery was relevant to show motive, which, in turn, tended to show both intent and identity. (*Id.* at pp. 857-858.)

Here, a direct relationship between the charged and the uncharged offenses was unnecessary as the uncharged offense was offered only on the issue of intent. (See *People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) In *Daniels*, the evidence was offered to show not only intent but also motive and identity.

Lastly, Washington claims the error was prejudicial because the prosecutor urged the jury to consider the uncharged incident to prove his intent in the charged incident. According to Washington, this argument essentially invited the jury to consider the prior conviction as evidence of Washington’s propensity to commit burglaries, which created a substantial danger of undue prejudice that outweighed the probative value of the evidence. Washington claims that, had the evidence not been introduced, the jury might have entertained a reasonable doubt that Hernandez had given Washington permission to use his card but later withdrew it.

However, the prosecutor did not make unfair use of the Costco incident in argument. The prosecutor argued only that the jury could consider Washington’s commission of the Costco burglary in deciding whether he entered Macy’s with the intent to steal. As the trial court admitted evidence to show Washington’s intent, the prosecutor’s argument was not improper.

In sum, the trial court did not abuse its discretion in finding the Costco burglary was relevant to show Washington’s intent in the Macy’s incident or that the probative value of the Costco burglary outweighed any danger of undue prejudice.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.